IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

LARRY J. BROWN,

OPINION and ORDER

Plaintiff,

10-cv-129-bbc

v.

BELINDA SCHRUBBE, PAUL SUMNICHT and CYNTHIA THORPE,

Defendants.

- -

Plaintiff Larry Brown is proceeding in forma pauperis on his claims that Belinda Schrubbe, Paul Sumnicht and Cynthia Thorpe were deliberately indifferent to his serious medical needs when they withheld various comfort items he uses to treat his headaches and back and neck pain, and refused to set up an appointment with a neurologist. Defendants have filed a motion for summary judgment, which has been fully briefed. After considering the parties' submissions, I conclude that the undisputed facts show that defendants did not violate plaintiff's Eighth Amendment rights, so I will grant defendants' motion for summary judgment and close this case.

As an initial matter, I note that many of plaintiff's proposed findings and responses to defendants' proposed findings cannot be considered because they are not *factual statements*.

Instead, plaintiff includes many responses containing legal argument rather than explaining what occurred. In any case, the parties do not seem to dispute most of the events forming the basis for plaintiff's claims. Instead, they dispute whether defendants' actions violated plaintiff's Eighth Amendment rights.

I find from the parties' submissions, including plaintiff's medical records, that the following facts are material and undisputed, unless otherwise noted.

UNDISPUTED FACTS

In August 1984, plaintiff was beaten by a group of fellow inmates at the Waupun Correctional Institution. (Plaintiff has been incarcerated at the Waupun prison for much of the last 27 years but has been transferred to and from the facility several times.) Since that time, plaintiff has complained of persistent headaches and musculoskeletal low back and neck pain.

Defendant Paul Sumnicht is a doctor at the Waupun Correctional Institution. Defendant Belinda Schrubbe is the health services manager at the Waupun prison and a registered nurse.

A. Treatment at the University of Wisconsin Hospital Neurology Clinic

From 1985 to 1990, plaintiff was seen several times by Dr. Henry Peters of the

University of Wisconsin Hospital Neurology Clinic. Following a March 19, 1985 appointment, Peters stated, "We continue to see evidence of a greater occipital neuralgia on the right in that pressure over the area reproduces most of his headache." Peters added that he "underst[ood] that physical therapy will be available and he could be considered to be a candidate for some Williams' exercises." On July 14, 1987, Peters suggested a trial of imipramine to alleviate pain. Following his November 29, 1988 meeting with plaintiff, Peters reiterated his diagnosis of greater occipital neuralgia. Also, he noted, "[Plaintiff] does use a TENS unit [an electrical nerve stimulator] and that should be continued. I do feel that he would benefit from some physical therapy with emphasis on working through Williams' exercises." After plaintiff's final appointment on January 2, 1990, Peters noted that the Pain Clinic had diagnosed plaintiff's tenderness in the back and neck as myofascial pain.

Plaintiff was seen by Doctors David Moore and Jack Rozental of the UW Hospital Neurology Clinic on October 8, 1991. Rozental found plaintiff's symptoms to be consistent with myofascial pain syndrome and chronic daily headaches and noted that these problems were aggravated by the stressors in plaintiff's life. He recommended relaxation techniques, "Williams' exercises" and use of a TENS unit, as well as an antidepressant and anti-inflammatory medications.

Plaintiff was seen by Doctors Ben Lotz and David Cobasko of the UW Hospital Neurology Clinic on June 13, 1994. Lotz reported that plaintiff had a long history of

"musculoskeletal discomfort." (The "musculoskeletal system" comprises the skeleton, muscles, cartilage, tendons, ligaments, joints and other connective tissue.) He recommended that plaintiff be placed on Prozac and continue to have access to a TENS unit.

B. Further Treatment

At various times from January 9, 1985 to September 7, 2007, plaintiff received orders for pain medication such as Motrin, Ibuprofen, Tylenol, Naproxen, and Soma as needed for muscle spasms, first tier restrictions, physical therapy, low bunk, extra pillow, extra mattress and a TENS unit. These items were ordered by Department of Corrections medical staff. X-rays were also taken by order of DOC physicians several times between 1985 and 2003, with at least one of these indicating that plaintiff had degenerative disk disease in the upper cervical spine.

Plaintiff was transferred back to the Waupun Correctional Institution on September 7, 2007, where he is currently incarcerated. At that time, he had restrictions for low bunk, an extra pillow and an extra mattress. On October 2, 2007, defendant Dr. Sumnicht met with plaintiff. Plaintiff stated that he had "what you might call deteriorating disc disease," constant pain, could not bend and experienced lower back, shoulder and neck pain after sitting for more than 15 minutes. After examination, Sumnicht found thoracic and lumbar stiffness and slightly increased lumbar lordosis from hip stiffness. Plaintiff was "evasive"

about his medical history. Also, plaintiff stated that there was no cure for his back pain, only symptom relief with the extra mattress and pillow. Sumnicht ordered analgesic cream, Excedrine migraine 30 tablets for 6 months, extra pillow for 6 months and low bunk for 6 months, but discontinued the extra mattress. Sumnicht planned to follow up on plaintiff's complaints of back pain and review his chart. Plaintiff was upset about the discontinuation of his extra mattress.

Plaintiff was seen again by defendant Sumnicht on October 19, 2007. Sumnicht noted that plaintiff's complaints of myofascial pain syndrome with fatigue and morning stiffness fit a diagnosis of fibromyalgia. (Plaintiff attempts to dispute this, responding that he did not complain of fatigue and morning stiffness, but he does not provide a sworn statement in support, so I will disregard the response.) Plaintiff refused Baclofen, gabapentin and ibuprofen, stating that he was trying to get rid of medications and that he only wanted an extra mattress. Sumnicht ordered a TENS unit and medications to control the pain.

On October 25, 2007, plaintiff was seen by Health Services Unit nursing staff for complaints of pain with urination. Plaintiff told the nurse that he either had or was going to quit taking all medications because the physician refused to give him an extra mattress.

Plaintiff was seen by family nurse practitioner Gorske on March 5, 2008. Gorske noted that plaintiff had recently been reclassified to moderate activity by his own request. She noted that defendant Sumnicht had written a diagnosis of fibromyalgia in the chart and

that plaintiff had refused treatment for the condition. Gorske assessed common back pain without radiculopathy. She gave plaintiff a pamphlet on fibromyalgia from the Mayo Clinic and encouraged him to increase his activity to include stretches and walking daily. Gorske noted that if plaintiff did have fibromyalgia, he should have light activity and that she would change his classification to light activity. Plaintiff was advised to submit a health service request if he was not improving or if he was getting worse. (Plaintiff states that Gorske disagreed with defendant's diagnosis of fibromyalgia, but the only evidence he supplies for this proposition is that she used the language "*if* [plaintiff] does indeed have fibromyalgia . . ." (emphasis added). This is not enough evidence to support a reasonable inference that she disagreed with the diagnosis. In any case, as discussed below, such a disagreement would not be enough to sustain a deliberate indifference claim.)

On April 1, 2008, plaintiff saw defendant Sumnicht, who noted that plaintiff had a low bunk restriction and extra pillow for the cervical spine degenerative joint disease. Upon examination, Sumnicht found mild epigastric soreness and noted that plaintiff shrugged his shoulders well. He planned to follow up with plaintiff and ordered Amitriptyline 50 milligrams for 12 months, Baclofen 10 milligrams for 12 months and an extra pillow for 6 months.

Defendant Sumnicht performed a chart review of plaintiff's medical file on April 2, 2008, to focus on plaintiff's complaints of neck pain and past evaluations and to determine

whether more evaluation or more medical restrictions were appropriate. Sumnicht found that plaintiff's X-rays and head CT scans were normal. Sumnicht noted that no MRIs were ordered or recommended and that there were no other imaging studies. The documentation showed that the extra mattress had been primarily prescribed for chronic neural health and myofascial pain. The degenerative joint disease of the spine was mild. Sumnicht made a note to consider cervical traction and physical therapy and planned to follow up and to change plaintiff's classification to light duty because heavy lifting worsens myofascial pain syndrome. He noted that plaintiff's classification had been changed to light duty on March 5, 2008. He ordered an extra mattress, extra pillow and low bunk for one year. He also ordered cervical traction, five pounds for ten minutes three times a week for four weeks. Cervical traction was discontinued after the first session because it caused plaintiff pain.

On May 15, 2008, defendant Sumnicht saw plaintiff for complaints of morning stiffness and daytime pain. Plaintiff said that he had back and neck pain after sitting for five minutes. Sumnicht found that plaintiff had a normal gait, the C-spine X-ray showed degenerative joint disease and the T-spine and L-spine were normal. Plaintiff's lumbar flexion was poor and hip extension was limited. Sumnicht noted that plaintiff had decent physical functioning and hand grasp, thoracic lumbar tightness and stiffness and needed range of motion stretching. Sumnicht made a plan to follow up with plaintiff. Sumnicht advised plaintiff on thoracic, lumbar and hip stretching, with demonstrations of the

exercises. He also ordered an H. pylori test to determine plaintiff's sensitivity to NSAIDs and continued the analgesic balm and Baclofen. Sumnicht discontinued the Baclofen and Amitriptyline on May 20, 2008, at plaintiff's request. However, on June 24, 2008, he continued plaintiff's prescription for aspirin for one year.

On July 3, 2008, plaintiff informed defendant Sumnicht that stretches helped the mid back and low back pain very little and that his neck was sore. Sumnicht noted that plaintiff's hand grasp was good and that the mid back pain was better. Sumnicht advised plaintiff to continue the stretches. He prescribed Amitriptyline 25 milligrams for one year and ordered a physical therapy evaluation for goals and recommendation on neck stiffness. The physical therapy evaluation was done on July 18, 2008. Plaintiff requested that further physical therapy treatment wait until he was out of segregation.

Defendant Sumnicht met with plaintiff on September 12, 2008, noting that plaintiff sat comfortably and moved well. Sumnicht diagnosed plaintiff as having myofascial pain. On September 24, 2008, Sumnicht ordered three physical therapy visits for plaintiff's neck and a TENS unit for his neck for 12 months.

Plaintiff went to physical therapy on September 29, 2008. He told the therapist, "To be honest, I don't think anything is going to help my pain until the stress is gone." Plaintiff was instructed on cervical range of motion exercises. He was given a TENS unit on October 1, 2008. On October 8, 2008, plaintiff had another physical therapy appointment. Plaintiff

refused his final two physical therapy appointments, stating that he had the TENS unit and thought it was working.

Defendant Sumnicht discontinued the order for Amitriptyline on November 3, 2008 after plaintiff said he no longer needed it. During an exam on December 17, 2008, plaintiff informed defendant Sumnicht that the TENS unit worked very well on his back pain. Sumnicht made a plan to follow up with plaintiff on his complaints of aches and fatigue. On April 10, 2009, Sumnicht renewed plaintiff's restriction for low bunk, an extra pillow and an extra mattress for 6 months.

Plaintiff's prescription for aspirin was renewed for one year on June 5, 2009. Plaintiff was seen by nursing staff on July 20, 2009, for complaints of back discomfort. The nurse noted that he had special needs restrictions and that he had a current order for an extra mattress. Plaintiff claimed that his mattress was hard. The nurse spoke with Sgt. Hilbert, who stated that he would attempt to replace the mattress. (In his response, plaintiff states that defendant Sumnicht retaliated against him by giving him a hard mattress, but he provides no evidence to support this assertion.)

Plaintiff's order for low bunk, extra mattress and extra pillow restriction expired on October 4, 2009. This order was not renewed. The order was subject to guideline requirements for special needs detailed in Bureau of Health Services Policy and Procedure 300.07. This policy was updated in August 2009, and states that medical staff should

approve only those comfort items "which have been scientifically shown to provide solid medical benefit, and to treat significant medical conditions." It states also that items should be provided indefinitely only when the prisoner's condition is permanent.

The Special Needs Committee, which consisted of defendant Belinda Schrubbe and Lt. Braemer in this case, reviewed plaintiff's medical chart for conditions that met the guideline requirements. (The parties do not explain when this review occurred but it appears to have been done in late September 2009, when the order for comfort items was expiring.) Defendant Sumnicht had concluded that plaintiff did not have a medical need for any of these items. None of the forms in plaintiff's medical chart detailing special needs items indicated that he had an indefinite need for the items. The committee determined that plaintiff did not meet the criteria for the low bunk, extra pillow and extra mattress. Plaintiff's order for comfort items had expired and medical staff saw no medical need to renew them. However, plaintiff's order for the TENS unit was not discontinued.

On October 26, 2009, defendant Sumnicht met with plaintiff. Sumnicht noted that plaintiff's restrictions had expired, that the "1985 trauma" remains and that plaintiff was refusing pain medication. Sumnicht noted further that plaintiff was sitting comfortably in chairs, nodding his head and was moving his arms.

Plaintiff was seen by nursing staff on November 16, 2009. Plaintiff said he had stopped taking his medications because he was frustrated that he was getting no medical

attention. After the exam, the nurse made a plan for plaintiff to take medications for chronic conditions. She noted that if plaintiff wanted comfort items, he could earn money and pay for them himself.

On December 9, 2009, defendant Sumnicht made a plan to follow up with plaintiff's neck pain. On December 25, 2009, plaintiff was seen by nursing staff for complaints of dizziness and back pain. Plaintiff stated he was on pain medication and that he had already taken them that day.

Plaintiff was seen by defendant Sumnicht for his complaints on January 4, 2010. Plaintiff told Sumnicht that all previous doctors said that he had musculoskeletal and degenerative disc disease. Sumnicht noted that plaintiff had no problems in his arms, had good hand grasp and got dressed "OK." Plaintiff moved his neck well and walked well. Sumnicht assessed fibromyalgia and made a plan to get X-rays of plaintiff's C-spine and L-spine.

On January 6, 2010, defendant Sumnicht performed a chart review on plaintiff's request to find out the specific diagnosis for his "musculoskeletal conditions." He noted the following: plaintiff had 12 evaluations for headache and neck pain in 1985. A neurology evaluation on June 13, 1994 for chronic headache showed findings of a musculoskeletal origin rather than neurologic. The report following a January 2, 1990 neurology appointment called the pain myofascial pain. A CT scan on March 29, 1988 of plaintiff's

head was normal. Upon review, Sumnicht found no evidence of neurologic injury and concluded that plaintiff's complaints seemed out of proportion to examination findings. Sumnicht assessed "myofascial pain triggered neck and low back pain" and made a plan for no change in treatment.

The X-rays defendant Sumnicht ordered were taken on January 25, 2010. The radiologist's reading of the C-spine and L-spine X-rays showed no abnormalities or misalignments. The X-rays of the neck did not reveal any degenerative disk disease.

Defendant Sumnicht met with plaintiff on February 22, 2010 to discuss plaintiff's complaints of "musculoskeletal injuries." Plaintiff stated that he had not had an examination by a neurologist for the cause of his pain. Sumnicht noted that plaintiff sat well and had good hand grasp. Plaintiff's other previous labs were normal and Sumnicht assessed no sign of neurologic disease except a left exotropia and myofascial pain. Plaintiff was prescribed Amitriptyline 50 milligrams. (Plaintiff states that at this meeting, defendant Sumnicht told him that health services did not have money to pay for an appointment with a specialist every time he thought something was wrong with him. However, this proposed finding is not supported by admissible evidence, so it will be disregarded.)

C. Tinted Glasses/Single Cell

On December 4, 1985, plaintiff told an optometrist that he wanted the lenses of his

glasses tinted and that he was willing to pay for them. The optometrist found no medical need for the tinted lenses so the tinted lenses were ordered at plaintiff's expense.

On January 31, 1989, Dr. Peters recommended that plaintiff wear tinted glasses for headache abatement. A doctor at the Columbia Correctional Institution (where plaintiff was incarcerated at the time) interpreted Peters's order as applying to outdoor use only, weighing the medical need against the security interest of the prison. In conjunction with previous litigation, an assistant attorney general wrote to Peters, asking him whether plaintiff's health was at risk by not wearing the glasses inside. (Neither party has produced evidence of Peters's response.)

On August 12, 1992, plaintiff wrote to Mary Janssen about getting an order to continue to wear the tinted glasses. Plaintiff stated in his letter that in 1984 the Health Services Unit allowed him to use the prescription to buy his own personal prescription sunglasses; during this time there was no policy or procedure stating an inmate must have something wrong with his eyes to wear such glasses. Plaintiff further stated that from 1984 to 1992, he had worn the glasses and his eyes had become sensitive to light, even though he did not have this problem when he first bought the glasses. On August 17, 1992, medical staff wrote a memorandum to security, saying that plaintiff could have his prescription #2 rose colored glasses indefinitely.

Plaintiff complained of photophobia (excessive sensitivity to light) to the optometrist

on April 18, 2002 and requested medical clearance to be placed in a single cell so that he could control the lighting all the time. Plaintiff reiterated his request for single cell placement to Dr. Cannon in a letter dated July 16, 2002. On September 11, 2002, plaintiff was seen by psychologist John Grammar in the Health Service Unit at Whiteville Correctional Facility to discuss his need for a single cell. Plaintiff said that he needed a single cell because both he and his cellmate had so much legal work, there was not enough room. Plaintiff stated that "I am frustrated and I file lawsuits when I am frustrated."

On March 26, 2003, the optometrist found that plaintiff's cornea, pupil and retina color were all within normal limits, giving no medical reason for dark tinted glasses at that time. The optometrist noted that plaintiff may have light sensitivity because he continually wore a dark tint indoors, so that he had a sensitivity to light when he removed the glasses. He added this was normal and that without the glasses plaintiff's eyes would adjust. Plaintiff's permission to wear the glasses was revoked.

Plaintiff was seen on March 21, 2005 by optometrist Dr. Richter. After examination, Richter noted "no medical indication for tinted glasses." (Plaintiff states that the removal of the tinted glasses has given him cataracts and other damage, but he provides no evidentiary support for this proposition.

D. Inmate Grievances

Defendant Cynthia Thorpe has been employed by the Wisconsin Department of Corrections as Health Services Nursing Coordinator since February 25, 2001. Her duties include hearing appeals of inmate grievances. Plaintiff filed a series of inmate grievances starting in October 2009. In both grievances WCI-2009-22156 and WCI-2009-27643, plaintiff complained about the denial of his extra mattress, low bunk and extra pillow. James Muenchow, the institution complaint examiner at the Waupun prison, conducted an investigation. He talked with defendant Schrubbe, the health services unit manager, who informed him that the Special Needs Committee had met and determined that plaintiff did not qualify for these items, citing the criteria in the Bureau of Health Services Policy and Procedure 300.07. Muenchow recommended dismissal of plaintiff's complaints, stating that no determination would be made with respect to plaintiff's claims because Muenchow brought "no particular expertise to the task of evaluating treatment protocol or whether a specific condition qualifies for a specific type of treatment, and how the Committee used that information to reach its decision." Acting as a reviewing authority within the inmate complaint review system, Thorpe reviewed Muenchow's findings in both cases and dismissed the complaints. In her decision on WCI-2009-22156, she stated, "Your physician ultimately determines this need." Plaintiff appealed both of these decisions all the way to the office of the Secretary, but his complaints were dismissed.

Plaintiff also filed inmate grievance WCI-2009-25711, complaining that he was not getting proper treatment for his back, head and neck. Muenchow directed plaintiff to contact defendant Schrubbe to attempt to resolve his concerns and plaintiff refused to do so. Noting plaintiff's refusal, Muenchow recommended that the complaint be dismissed; defendant Thorpe accepted his recommendation. Plaintiff appealed that decision all the way to the office of the Secretary, but his complaint was dismissed.

Finally, plaintiff filed inmate grievance WCI-2010-4421, complaining that he was having problems with his vision, including seeing black dots, and stating that he was in the early stages of developing cataracts. Plaintiff stated that this occurred because his tinted glasses had been taken away. Muenchow talked to defendant Schrubbe, who stated that Dr. Richter previously determined that he did not need the dark glasses. Muenchow recommended dismissing the grievance, stating that he is not in the position to question the treatment decision made by medical professionals. On appeal, defendant Thorpe stated that plaintiff's complaint indicated that he was having eye problems beyond just requesting his tinted glasses. She affirmed Muenchow's decision regarding the glasses but modified it to order that plaintiff have an eye appointment scheduled. Plaintiff appealed the decision but it was affirmed by the corrections complaint examiner, who suggested that plaintiff discuss the issue with his eye doctor. Plaintiff appealed the decision to the office of the Secretary, but his complaint was dismissed.

DISCUSSION

A. Defendants' Motion for Summary Judgment

To succeed on a motion for summary judgment, the moving party must show that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c)(2); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Under the Eighth Amendment, a prison official may violate a prisoner's right to medical care if the official is "deliberately indifferent" to a "serious medical need." Estelle v. Gamble, 429 U.S. 97, 104-05 (1976). A "serious medical need" may be a condition that a doctor has recognized as needing treatment or one for which the necessity of treatment would be obvious to a lay person. Johnson v. Snyder, 444 F.3d 579, 584-85 (7th Cir. 2006). A medical need may be serious if it "significantly affects an individual's daily activities," Chance v. Armstrong, 143 F.3d 698, 702 (2d Cir. 1998), if it causes pain, Cooper v. Casey, 97 F.3d 914, 916-17 (7th Cir. 1996), or if it otherwise subjects the prisoner to a substantial risk of serious harm, Farmer v. Brennan, 511 U.S. 825 (1994).

The Eighth Amendment to the United States Constitution requires the government to "provide humane conditions of confinement; prison officials must . . . 'take reasonable measures to guarantee the safety of the inmates.'" Farmer v. Brennan, 511 U.S. 825, 832, (1994). To state an Eighth Amendment failure to protect claim, a prisoner must allege that (1) he faced a "substantial risk of serious harm" and (2) the prison officials identified acted

with "deliberate indifference" to that risk. Id. at 834; Brown v. Budz, 398 F.3d 904, 909 (7th Cir. 2005). Under the deliberate indifference standard, a prison official may be held liable under the Eighth Amendment "only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." Farmer, 511 U.S. at 847.

Inadvertent error, negligence, gross negligence and ordinary malpractice are not cruel and unusual punishment within the meaning of the Eighth Amendment. Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996); Snipes v. DeTella, 95 F.3d 586, 590-91 (7th Cir. 1996). Thus, disagreement with a doctor's medical judgment, incorrect diagnosis or improper treatment resulting from negligence is insufficient to state an Eighth Amendment claim. Gutierrez v. Peters, 111 F.3d 1364, 1374 (7th Cir. 1997); Estate of Cole by Pardue v. Fromm, 94 F.3d 254, 261 (7th Cir. 1996). Instead, "deliberate indifference may be inferred [from] a medical professional's erroneous treatment decision only when the medical professional's decision is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible did not base the decision on such a judgment." Estate of Cole, 94 F.3d at 261-62.

Unfortunately for plaintiff, the summary judgment record developed by the parties closely resembles the record produced by the briefing of plaintiff's motion for preliminary injunctive relief, which I denied in a March 31, 2011 order. The summary judgment record

shows that defendant Sumnicht or other medical staff have met with plaintiff 55 times over the last four years. Plaintiff's medical records provide detailed reports showing that defendant Sumnicht has examined plaintiff at length, characterized his maladies as musculoskeletal rather than neurological and found no medical need for a low bunk, extra pillow, extra mattress or further neurological appointments. Medical staff, including Sumnicht, have proposed many different types of treatment, including exercises, physical therapy and medication. The current course of treatment appears to be continued use of the TENS unit along with medication. As I stated in the March 31 order, the undisputed facts show that defendant Sumnicht *is* treating plaintiff for his head, neck and back pain.

The heart of plaintiff's argument is that regardless what defendant Sumnicht currently prescribes, he has acted with deliberate indifference because his diagnoses and treatment decisions have differed from the views of plaintiff's previous doctors, which plaintiff characterizes as being in close agreement. It is not clear that this is so, in large part because the previous doctors did not even agree on the precise medical condition afflicting plaintiff. For instance, Dr. Peters diagnosed greater occipital neuralgia. Also, he noted that the UW pain clinic characterized plaintiff's tenderness in the back and neck as myofascial pain. Dr. Rozental diagnosed myofascial pain syndrome and chronic daily headaches aggravated by the stressors in plaintiff's life. Dr. Lotz reported only that plaintiff had a long history of "musculoskeletal discomfort." In addition, I note that plaintiff fails to show what diagnoses

he had received from his previous Department of Corrections doctors before Sumnicht reviewed his condition.

By comparison, Sumnicht examined plaintiff several times, diagnosing fibromyalgia and myofascial pain, which to some extent was similar to the diagnoses by Drs. Moore, Rozental and Lotz. Regarding the diagnosis of degenerative disc disease, X-rays taken in 2003 indicated that plaintiff had this affliction. However, in 2008, defendant Sumnicht reviewed plaintiff's records and considered the disease to be mild; in 2010, a new set of X-rays failed to show any signs of the disease. It is rarely possible to find deliberate indifference where the treating physician has continually checked up on the condition and adjusted treatment based on test results.

Nor is there much of any discrepancy in the type of treatment methods ordered by Sumnicht as opposed to those ordered by the previous doctors. Peters seems to have prescribed a TENS unit, physical therapy, Williams's exercises and medication. Dr. Rozental prescribed relaxation techniques, Williams's exercises, a TENS unit, an antidepressant and anti-inflammatory medications. Dr. Lotz prescribed Prozac and a TENS unit. It is undisputed that Sumnicht has tried most of these methods, and for now has chosen to treat plaintiff with the TENS unit and pain medication, methods recommended by the previous doctors. With one exception, the records do not show the previous doctors recommending the comfort items plaintiff seeks in this lawsuit, such as an extra mattress,

extra pillow, medical single cell or a lower bunk restriction.

The one exception is the tinted-lens glasses. It is undisputed that Dr. Peters recommended the glasses for headache abatement on January 31, 1989, yet plaintiff was no longer allowed to wear the glasses starting in March 2003, after an optometrist concluded there was no medical reason plaintiff should have the glasses. In 2005 another optometrist confirmed that opinion. Plaintiff asserts that Peters's 1989 treatment decision as a neurologist should trump any subsequent decision. This is incorrect.

I note initially that it is not clear whether defendant Sumnicht is an appropriate defendant for this claim because there is no evidence showing that he ever made specific determinations about tinted glasses, as opposed to decisions about the other comfort items. For that matter, it is unclear whether he was even aware of Peters's recommendation (the 1989 order is missing from plaintiff's medical records, but the parties now agree that it existed, as shown by later correspondence between an assistant attorney general and Peters).

However, even assuming that Sumnicht was aware of the recommendation, it is clear that he did not agree with Peters's diagnosis of greater occipital neuralgia, for which the glasses were a treatment option. Instead he agreed with Drs. Moore, Rozental and Lotz, whose diagnoses centered around musculoskeletal problems. Sumnicht did not exhibit deliberate indifference by failing to order treatment for a malady he believed to be an incorrect diagnosis, particularly after two optometrists had found no medical need for the

tinted glasses.

Finally, I note that it is unclear whether plaintiff is even pursuing a claim that he is suffering headaches as a result of being without the glasses. Instead, he now claims to be suffering from a variety of eye injuries, including cataracts, which are not conditions for which Peters recommended the glasses.

At any rate, plaintiff cannot escape summary judgment merely by showing that defendant Sumnicht's diagnoses and treatment decisions differed from those of previous doctors. "[M]ere differences of opinion among medical personnel regarding a patient's appropriate treatment do not give rise to deliberate indifference." Estate of Cole, 94 F.3d at 261. Instead, "deliberate indifference may be inferred [from] a medical professional's erroneous treatment decision only when the medical professional's decision is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible did not base the decision on such a judgment." Estate of Cole, 94 F.3d at 261-62. The undisputed facts show an extensive history of treatment and attention by Sumnicht. Plaintiff has produced no evidence, such as expert testimony, suggesting that Sumnicht's treatment decisions were a "substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible did not base the decision on such a judgment." Id. In short, the fact that defendant Sumnicht has not pursued the type of treatment that plaintiff prefers does not

mean that Sumnicht has violated his Eighth Amendment rights. Further, given that defendant Sumnicht's underlying treatment decisions do not violate the Eighth Amendment, there is no support for plaintiff's claims that defendant Schrubbe violated his rights by relying on those decisions in conducting a review of his comfort items as part of the Special Needs Committee or that defendant Thorpe violated his rights by ruling against him in her review of his inmate grievances.

I must address plaintiff's other main argument. He argues that defendants' deliberate indifference can be seen by their application of the new version of Bureau of Health Services Policy and Procedure 300.07, which was adopted in August 2009. Neither party provides a copy of the previous version of this policy, but it can be inferred from the parties' submissions that the August 2009 policy tightened the rules for prescribing comfort items to prisoners. Plaintiff was given various comfort items in the years preceding the new rule, but when the Special Needs Committee (of which defendant Schrubbe was a member) applied the new rule, it determined that plaintiff did not need the items because defendant Sumnicht had determined that they were not medically necessary. Plaintiff argues that his comfort items should have been "grandfathered," regardless of the new rule, but he does not explain why the Eighth Amendment would require this. The mere fact that prison rules may have been more generous in the past in terms of providing comfort items, or that Sumnicht prescribed certain items at one point, does not mean that the removal of those items violates

the Eighth Amendment. I have already concluded that the undisputed facts show that defendant Sumnicht's treatment decisions have not violated plaintiff's Eighth Amendment rights.

B. Remaining Motions

Defendants have filed a motion to stay the submission of pretrial filings and plaintiff has filed a motion to enjoin the Department of Corrections from rescinding his legal loan. Because I am granting defendants' motion for summary judgment and closing the case, these motions will be dismissed as moot. Should plaintiff file any post judgment motions he is free to renew his motion regarding the legal loan.

Also, plaintiff has filed a motion for Rule 37 sanctions for defendants' failure to follow a discovery order. On June 24, 2011, Magistrate Judge Stephen Crocker issued an order granting plaintiff's motion to compel defendants to disclose (1) any disciplinary reprimands against them; and (2) the "person place or thing who makes the determination that an inmate's [medical] condition is a 'permanent condition.'" Dkt. #71. Plaintiff's motion, dated July 5, 2011, is premature for purposes of issuing sanctions. Therefore, I will deny the motion. In any case, because this case has been resolved on defendants' motion for summary judgment, the discovery order, like any other deadlines set in this case, is no longer operative. Defendants need not comply with the June 24 order.

ORDER

IT IS ORDERED that

1. Defendants Belinda Schrubbe, Paul Sumnicht and Cynthia Thorpe's motion for summary judgment, dkt. #49, is GRANTED. The clerk of court is directed to enter judgment for defendant and close this case.

2. Defendants' motion to stay the submission of pretrial filings, dkt. #75 is DENIED as moot.

3. Plaintiff Larry Brown's motion to enjoin the rescinding of his legal loan, dkt. #79, is DENIED without prejudice as moot.

4. Plaintiff's motion for Rule 37 sanctions, dkt. #76, is DENIED.

Entered this 13th day of July, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge